In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-514

HOWARD NICHOLAS JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in conditioning his request for a non-jury trial on the waiver of special findings of fact by the court.

Following a non-jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on four counts charging the selling of securities without registration, two counts charging the fraudulent selling of securities, and one count charging mail fraud, in violation of 15 U.S.C. 77e(a), 15 U.S.C. 77q(a), and 18 U.S.C. 1341. He was sentenced to three years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A; 496 F. 2d 1131).

The facts are stated in the opinion of the court of appeals (Pet. App. 44-47; 496 F. 2d at 1133-1135). Briefly, they show that in 1969, James Owens and Robert

Doty decided to establish a television production business in Atlanta, Georgia, that would produce television commercials and special features for the local television stations.

Petitioner was introduced to Owens and Doty by a local realtor as an interested investor in the new business. Petitioner reviewed the tentative plans and agreed to finance the business. On April 30, 1969 the business was incorporated by Owens and Doty as Television Productions, Incorporated, and petitioner was named president.

On May 15, 1969, a formal agreement was executed whereby petitioner agreed to guarantee the purchase of television equipment and to open a line of credit for the corporation. In return, petitioner received 50 percent of the corporation's stock and the right to vote the retained shares of Doty and Owens, if the corporation should fall in arrears on its debts for three months.

On June 17, 1969, without the knowledge of Owens or Doty, petitioner merged Television Productions, Incorporated with Sand and Seas Industries, Inc., a Florida corporate shell, by forging the signatures of Doty and Owens on the merger plan. The plan stated that the merger had been approved on June 6, 1969, by all the directors of Television Productions, Inc. The merged Florida corporation was named Television Productions International Corporation.

Petitioner and one J. Francke Fox, Jr. took potential investors on a tour of the Atlanta premises and sold stock in the newly merged corporation. As an inducement to purchasers to buy the stock, petitioner agreed to repurchase the shares, which were sold at $4 per share, for $6 per share in 12 or 18 months from the date of purchase. He further wrote to the investors on stationery

with the heading "Television Productions International, Incorporated," which firm was not yet in existence at the time when the letters were written, and signed the letters as president. The investors were in fact buying stock in Television Productions International Corporation, the Florida corporation. On March 13, 1970, Owens and Doty, who had been dissatisfied with petitioner, found a new investor and formed a Georgia corporation named Television Productions International, Inc.

On December 11, 1969, petitioner opened a bank account at the Halifax National Bank of Port Orange, Florida, in the name of Television Productions International, Incorporated, which was not in existence at the time, and presented to the bank a fraudulent corporate resolution. Doty, Owens and other Television Productions International Corporation stockholders were never informed of the Florida bank account, although $19,000 of the proceeds of the sale of the stock of that corporation were placed in the account and could be withdrawn by petitioner and his wife. Thereafter petitioner refused to honor his agreement to repurchase the stock.

Prior to trial the district judge and petitioner had the following discussion (Pet. App. 50; 496 F. 2d at 1136):

THE COURT:	You have the right, if you so desire, to waive a jury trial, that is, by your own agreement not to have a jury trial. Do you understand that?
MR. JOHNSON:	Yes, sir.
THE COURT:	I am also required under the law in a non-jury trial to make findings of fact and conclusions of law, written findings of fact

and conclusions of law. However, I have already advised your lawyer that in the event you would not waive that right that I would proceed to try it by jury, because I just don't have the time in which to review it later on and make findings of fact and conclusions of law.

You have the right to waive the Judge's written findings of fact and conclusions of law and have him pronounce judgment at the conclusion of the trial—.

MR. JOHNSON: Yes sir.

THE COURT: —on the various counts. Now, do you understand that?

MR. JOHNSON: Yes, sir.

THE COURT: And do you waive your right to have the Judge make findings of fact and conclusions of law in this case?

MR. JOHNSON: Yes, sir, I do.

Petitioner's contention that the trial court erred in conditioning his request for a non-jury trial on the waiver of special findings of facts by the court was rejected in the opinion of the court of appeals. We rely upon the following portion of the opinion (Pet. App. 51-54; 496 F. 2d at 1136-1138):

> The precise issue which is urged by appellant today has only been resolved by two other circuit court opinions. In *Howard* v. *United States*, 423 F. 2d 1102 (9th

Cir. 1070), the appellant made a specific request for findings of fact. The trial court, however, refused to permit a bench trial until the appellant executed a waiver of his earlier request of special findings. The Ninth Circuit, in strong language, rejected the trial court's conditions for a non-jury trial, stating:

> We cannot condone an avoidance of Rule 23(c) by the expedient of conditioning a jury waiver on a waiver of special findings. The defendant's right to such findings is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court.

423 F. 2d at 1104. First, it should be noted that the *Howard* case is somewhat distinguishable from the present fact situation. Unlike appellant Howard, Johnson request special findings. In *Howard* the court at no time during the trial or following trial, did Johson request special findings. In *Howard* the court gave emphasis to a *timely* request for findings in the following statement:

> Under Rule 23(c) of the Federal Rules of Criminal Procedure the defendant was entitled to those findings, and it would have been reversible error to have refused *his timely request for them.* (emphasis added)

423 F.2d at 1104. Finally, while the trial court in *Howard* did not make any special findings, the trial court in the instant case at the time it rendered its verdict and at the sentencing hearing, did make comments from the bench which cured its initial refusal to make specific findings of facts. These comments will be discussed below.

The *Howard* opinion was adopted as the guiding rule of law by the Third Circuit sitting *en banc* in *United States* v. *Livingston,* 459 F. 2d 797 (3d Cir. 1972). The Third Circuit posed the issue presented as ". . . whether it was permissible for the district judge to condition his grant of defendant's request for a non-jury trial on defendant's waiver of findings of fact and conclusions of law." 459 F.2d at 797. Importantly, *Livingston* differed from *Howard* in that appellant Livingston never requested findings of fact. *Livingston* like the instant case involved the issue of whether the district court may condition a non-jury trial on waiver of specific findings by the court even where there never was a request for findings by the defendant and he specifically waived his rights at the behest of the trial court.

In response to the issue presented, the Third Circuit held:

> . . . [T]he district court erred when it conditioned defendant's request for a non-jury trial on a waiver by him of his right to request that the court find the facts specially.
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> Findings of fact are essential to proper appellate review of a conviction resulting from a non-jury trial. This was an important consideration when the present text of Rule 23(c) was promulgated, altering preexisting law and *requiring* the trial judge to make special findings, if requested.

459 F.2d 798. Accordingly, the case was not reversed but was remanded to the district court so that it could make the special findings of fact.

See also, *United States* v. *Snow*, 484 F. 2d 811, 812 (D.C. Cir. 1973) (where district court recognized the need for special findings but through inadvertence failed to do so, the case was remanded for special findings); *Haywood* v. *United States*, 393 F.2d 780 (5th Cir. 1968) (where general findings made by the district court were inconsistent and confusing and the right of allocution was denied, the case was reversed and remanded).

In some situations, it may be impermissibly coercive for a trial court to condition a non-jury trial on the waiver of special findings of fact. Special findings are necessary, especially in a complex case, for an intelligent appellate review of a defendant's contentions. Whether the defendant desires special findings should normally be his decision alone.

The Government vigorously contends, however, that the trial court through comments from the bench at the time it delivered its judgment and subsequently at the sentencing hearing elucidated the grounds on which it based its judgment. We agree.[6] Although the reasons delineated at these

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6. We have held previously that findings of fact made from the bench following the trial of a civil case may be sufficient to meet the mandatory requirements of Rule 52, F.R. Civ. P. See *Movible Offshore, Inc.* v. *M/V Wilken A Falgout*, 471 F. 2d 268 (5th Cir. 1973). See also *Amplex of Maryland, Inc.* v. *Outboard Marine Corp.*, 380 F. 2d 112 (4th Cir. 1967). Of course, whether oral findings are sufficient will depend on the circumstance presented by each case.

two hearings were not as complete as they could be they do suffice as a basis for intelligent appellate review.[7] These observations by the trial court demonstrate to us that the court applied the correct legal principles to the instant case.[8]

It is not necessary for us to answer the precise issue presented to the Ninth and Third Circuits since we hold that even assuming that error was committed below by the trial court's imposition of the condition, this error was nevertheless cured by its subsequent findings from the bench.

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7. Although not completely applicable to the instant criminal case, our court has previously enunciated standards for determining whether a trial court's findings of fact are adequate in a civil suit. In *Gulf King Shrimp Company* v. *Wirtz*, 407 F. 2d 508, 515 (1969), the court explained that:

> "The purpose of F.R. Civ. P. 52 is to afford the appellate court a clear understanding of the basis of the trial court's decision. *Featherstone* v. *Barash*, 10 Cir. 1965, 345 F.2d 246. 'The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision.' *Carr* v. *Yokohama Specie Bank, Limited*, 9 Cir. 1952, 200 F. 2d 251, 255. 'Findings may be sufficient if they permit a clear understanding of the basis of decision of the trial court, irrespective of their mere form of arrangement.' *Featherstone* v. *Barash, supra*, 345 F. 2d at 350."

The underlying purpose of Rule 52, F.R. Civ. P., and Rule 23(c) F.R. Cr. P., is the same. In this case, the trial court has made adequate findings for purposes of our review. See also *Lettsome* v. *United States*, 434 F.2d 907, 909 (5th Cir. 1970).

8. The trial court noted that the names of the various corporations involved were very similar and that it was quite understandable how potential investors were misled and that this confusion "was part of the scheme" used to defraud investors. He further commented that "there's no question but that the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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securities were unregistered, that they were sold and that the mails were used in effecting those sales." Additionally the district court observed that "[t]here is no evidence that this was a restricted sale, anybody who wanted to buy it could buy that came up and wanted to buy. There was no offer to show the financial status of the company." It is not necessary that special findings be filed simultaneously with the verdict. Indeed, one court has held they may be filed subsequent to sentencing. See *United States* v. *Ogden*, 484 F. 2d 1274 (9th Cir. 1974).